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IN THE

Supreme Court of the United States

OCTOBER TERM 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY OF PETITIONERS TO RESPONDENTS' JOINT BRIEF IN OPPOSITION AND RESPONDENTS' SUPPLEMENTAL BRIEF IN REPLY TO UNITED STATES AS AMICUS CURIAE

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REPLY OF PETITIONERS TO RESPONDENTS' JOINT BRIEF IN OPPOSITION AND RESPONDENTS' SUPPLEMENTAL BRIEF IN REPLY TO UNITED STATES AS AMICUS CURIAE

In Respondents' Joint Brief in Opposition and their Supplemental Brief in Reply to the United States as *Amicus Curiae*, the respondent motor carriers contend that the Interstate Commerce Commission possesses adequate remedies over unauthorized and illegal rate making and that Congress has recognized and *sub silentio* endorsed the exclusiveness of ICC-generated relief to aggrieved ship-

pers. The respondents also contend that principles of *stare decisis* should require this Court to avoid review of the *Keogh* doctrine notwithstanding the Second Circuit's conclusion that *none* of the reasons enunciated by the Court in support of the result in *Keogh* are valid today. The respondents' contentions are erroneous.[1]

ARGUMENT

1. The ICC Supports The Petition For Certiorari And Itself Has Noted Budgetary Constraints Which Limit Its Ability To Review Tariff Filings

It should be noted that the Brief as *Amicus Curiae* of the United States was signed not only by the Solicitor General,

[1]The respondents' Supplemental Reply to the United States also mischaracterizes the prior position of the government with respect to *Keogh*'s current validity. On page 5 of their Supplemental Brief, respondents state:

> Just last year, in *ICC v. American Trucking Associations, Inc.*, 104 S. Ct. 2458 (1984), the United States argued to this Court precisely the opposite—that because of *Keogh* and its restriction on treble damages recovery, the ICC required broad power to nullify rates retroactively, and to award shippers damages under the Interstate Commerce Act for rate bureau violations.

The government, however, did *not* argue that *Keogh* should or does restrict treble damage recovery. In fact, what the government said was:

> Amici also argue that antitrust liability (see Amici a. 13, n.23) is a 'powerful' and adequate deterrent. But it is doubtful that many shippers can undertake an antitrust action given the costs and risks of such litigation. See *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922). More important, the *Commission* has no power to bring claims against carriers for violations of the antitrust laws.

Reply Brief for the United States at pp. 4-5. To the best knowledge of petitioners, at no time since passage of the Reed-Bulwinkle Act in 1948 has the government taken the position that antitrust damage recovery by shippers is prevented under *Keogh* when motor carriers are in direct violation of their rate bureau agreement or deliberately choose to conspire outside of the terms of the rate bureau agreement.

but by the ICC and the Department of Transportation as well. It is incongruous for the respondent motor carriers, charged with knowingly violating their rate bureau agreement, to assert that the ICC has adequate resources and authority to scrutinize conspiratorial rate filings when the ICC itself is supporting review of the *Keogh* decision.

In *ICC v. American Trucking Associations, Inc.*, 104 S. Ct. 2458 (1984), in which the present respondent, Niagara Frontier Tariff Bureau, also was a co-respondent, the Brief of the ICC detailed to this Court the inability of the Commission to pre-examine tariff filings even for obvious errors. The Commission stated:

> As a practical matter, therefore, unless a defect [in a tariff filing] is called to the Commission's attention by an interested party, virtually all tariffs filed with the Commission automatically go into effect.

Petitioners' Brief at 3.[2]

Budgetary constraints preclude the Commission from investigating more than a *de minimus* number of tariff filings. The ICC obviously is unable to review hundreds of point-to-point tariff filings included within long-term conspiracies such as the one alleged in this action. The *Keogh* doctrine is being used to shield retention of substantial revenues collected under a deliberate collusive scheme to avoid compliance with a rate bureau agreement. When the Court—not Congress—promulgated *Keogh*, it was not intending to afford wrongdoers an opportunity to profit by circumventing ICC regulation. Today's distorted use of *Keogh* to achieve a result contrary to the public interest is

[2]For the convenience of the Court, the applicable portion of the Statement of the Case set forth in the Brief of the ICC in the *ATA* case is reprinted as Appendix A to this reply.

yet another strong reason favoring review of *Keogh* by this Court.

2. Congress Has Not Endorsed The Keogh Doctrine

The *Keogh* doctrine was a judicial accommodation between apparently contradictory statutory directives and never has been endorsed by Congress. The issue of when and under what circumstances antitrust immunity would be extended to rate bureaus and their members was addressed in the Reed-Bulwinkle Act. Pub. L. No. 80-662, 62 Stat. 472 (1948). The language of the Act unequivocally conditions exemption from the antitrust laws on compliance with the Interstate Commerce Act and with rate bureau agreements approved by the ICC. It would be self-defeating to the regulatory plan set forth in Reed-Bulwinkle to extend immunity to surreptitious conspiracies to circumvent rate bureau agreements. Thus, denial of *Keogh* immunity to carriers which choose to operate outside of the immunity extended by Reed-Bulwinkle could not conflict with any Congressional goal.

3. *Stare Decisis* Is Inapplicable Where The Underlying Decision Has Not Been Reviewed In Light of Statutory Changes And Later Decisions Of The Court Which Reject The Prior Rationale

It would not be appropriate to apply principles of *stare decisis* to prevent, for all practical purposes, shippers from any recovery of deliberately-imposed illegal overcharges. This is especially so when, as recognized by the court of appeals, the original rational for *Keogh* has been discarded. Review is all the more appropriate in light of the *Keogh* decision's plain inconsistency with *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213 (1966), as well as the recognition by all nine justices in *ICC v. ATA* that shippers

may recover damages under the antitrust laws.[3] Moreover, the passage of the Reed-Bulwinkle Act in 1948 expressly conditioned immunity under the antitrust laws to compliance with the regulatory plan of the Act and thus limited *Keogh*'s applicability.[4]

4. *Stare Decisis* Does Not Apply To Situations Not Encompassed Within the Prior Decision

Principles of *stare decisis* can hardly apply to issues which were not presented or decided in a prior decision. *United States v. Mitchell*, 271 U.S. 9 (1926). The Court's *Keogh* decision concerned nothing more than an attempt to resolve differences between the language of the Interstate Commerce Act which permitted the ICC to approve jointly proposed rates and the Sherman Act prohibition against collective price fixing. Nothing in the *Keogh* fact situation dealt with coercive suppression of independent rates. Neither did *Keogh* involve rates which, while filed with the ICC, were formulated in knowing and secret defiance of ICC regulations.

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[3]Under respondents' reading of *Keogh*, the recovery of antitrust damages related to illegal rate filings or suppressed rate filings is forbidden in all circumstances. It is impossible to square that position with the entire Court's recognition in *ATA* that shippers may recover damages under the antitrust laws.

[4]The case of *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), on which respondents seek to rely, was decided prior to the passage of the Reed-Bulwinkle Act.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 29, 1985

APPENDIX

APPENDIX A

FROM BRIEF FOR THE PETITIONERS IN INTERSTATE COMMERCE COMMISSION V. AMERICAN TRUCKING ASSOCIATIONS, INC., NO. 82-1643, OCT. TERM 1983

Statement

1. Under the Interstate Commerce Act, 49 U.S.C. (& Supp. V) 1 *et seq.*,[1] carriers establish and change their rates for transportation services by filing rate schedules, known as tariffs, with the Interstate Commerce Commission. A tariff filed with the Commission generally becomes effective only after a waiting period.[2] During the waiting period, the Commission entertains any protests against the rate and decides whether to reject it, suspend its effectiveness, investigate it, or permit it to become effective without investigation. See 49 U.S.C. 10762(e), 10707, 10708. Once a tariff is in effect, carriers must charge and shippers must pay the rates named in the tariff. 49 U.S.C. 10761.

Until 1979, the Commission examined every filing for obvious defects prior to the tariff's effective date. Tariffs containing serious errors were rejected, and the carrier was required to refile an acceptable tariff. When an insubstantial error was discovered, the Commission either required prompt correction, or advised the carrier of the error and requested that it take more care in the future. Because this preexamination procedure minimized the

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[1]Hereafter, references to 49 U.S.C. will be to the current statute, printed in Supp. V, unless otherwise indicated.

[2]The waiting period for railroad rates is 20 days (10 days for reductions). 49 U.S.C. 10762(c)(3). Motor carrier rates become effective after 30 days. 49 U.S.C. 10762(a)(2). The Commission has the power to shorten the waiting period. 49 U.S.C. 10762(d)(1).

possibility that a tariff containing errors would become effective, the Commission generally imposed no penalty on those rare occasions when an error was discovered after a tariff had gone into effect.

When budget reductions forced the Commission to reallocate its scarce resources, the Commission determined that it could no longer maintain sufficient tariff examiners to preexamine every filing. Accordingly, in October 1979, the Commission began reviewing only a random sample of tariff filings.[3] As a practical matter, therefore, unless a defect is called to the Commission's attention by an interested party, virtually all tariffs filed with the Commission automatically go into effect.

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[3]Currently, the Commission examines only the title pages of tariff filings.